IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 695

UNITED STATES OF AMERICA,
Appellant,

v.

THE PROCTER & GAMBLE COMPANY, COLGATE-PALMOLIVE COMPANY, LEVER BROTHERS COMPANY and THE ASSOCIATION OF AMERICAN SOAP AND GLYCERINE PRODUCERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

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No. 609

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS OR AFFIRM

Appellant, the plaintiff below, has appealed from judgments dismissing this action. These judgments of dismissal were originated, caused and consented to by the plaintiff. Accordingly, the defendant, The Procter & Gamble Company (hereinafter called "Procter"), acting pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby moves that this Court either dismiss the appeal or affirm the dismissal judgments.

STATEMENT

The District Court of the United States for the District of New Jersey on September 13, 1956, entered judgments dismissing an action brought by the United States against

the appellees under Sections 1, 2 and 4 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209; 15 U. S. C. Secs. 1, 2 and 4). The plaintiff is now seeking to appeal under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Sec. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

It is in order for this Court to pass upon this motion to dismiss or affirm before it is required to consider a long record (more than 1850 pages) and involved issues which, we submit, are not properly before the Court.

The Appendix to plaintiff's Jurisdictional Statement and the defendants' Joint Appendix, both filed in this Court, show the following:

Testimony was presented by the Government before a federal Grand Jury sitting in Newark, New Jersey, in connection with an investigation of possible antitrust law violations in the soap and synthetic detergent industry. No indictment was ever returned, and the Grand Jury was discharged on November 25, 1952. About two weeks later, on December 11, 1952, plaintiff commenced the instant civil action (Jurisdictional Statement, pp. 11-12).

Thereafter, motions were filed by Procter on September 24, 1954, and by the other defendants in November 1955, for leave to defendants to inspect and copy the transcripts of the Grand Jury testimony (Joint appendix, pp. 1, 5, 6, 8). The defendants contended, and plaintiff finally admitted, that plaintiff used the Grand Jury testimony both in determining whether its civil action should be brought and also in actually bringing the action, and that plaintiff used and continued to use the Grand Jury testimony in preparing for the trial of the civil action.[1] The defendants claimed that under the Rules of Civil Procedure they were entitled to

[1]See Jurisdictional Statement, pp. 13-17, 23, 53; *United States v. Procter & Gamble Company*, D. N. J., 19 F. R. D. 122, 123-5, 128 (1956); *United States v. Procter & Gamble Company*, D. N. J., 19 F. R. D. 247, 250 (1956).

equal access to that testimony and that it was essential to the preparation of their defenses.

After submission of exhaustive briefs and a full hearing, the District Court, in an opinion filed on April 17, 1956, held that the motions to inspect and copy the Grand Jury transcripts should be granted (Jurisdictional Statement, p. 11).[2]

In this opinion, the court found that the plaintiff had used and intended to use the Grand Jury testimony in bringing and preparing the civil case, which fact the plaintiff reluctantly but finally admitted (Jurisdictional Statement, p. 53). The court also found that the transcripts must, therefore, contain evidence relevant and necessary in the case. Accordingly, the court ruled that, in line with *Hickman* v. *Taylor*, 329 U. S. 495, 507 (1947), the ends of justice required that all parties should have mutual knowledge of the Grand Jury testimony, particularly in the so-called "Big Case."

The court held that none of the reasons for secrecy, as summarized in *United States* v. *Rose*, 3 Cir., 215 F. 2d 617, 628 (1954), applied. The court, relying on such authorities as *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233, 234 (1940), *United States* v. *Ben Grunstein & Sons Company*, D. N. J., 137 F. Supp. 197 (1955) and 8 Wigmore, *Evidence* (3d Ed. 1940) § 2362, also held on the facts of this case that, the Grand Jury having been discharged, disclosure was proper.

The court clearly distinguished certain criminal cases involving attempts by defendants to obtain production of the transcripts with a view to attacking the validity of the indictments and contesting the adequacy of evidence before

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[2] *United States* v. *Procter & Gamble Company*, D. N. J., 19 F. R. D. 122 (1956).

the Grand Jury to sustain an indictment.[3] The court pointed out that such cases had no application to the instant civil case where disclosure of the transcripts was sought for discovery purposes in connection with trial.

Accordingly, the District Court found that "this case" was one in which "the requirement of secrecy * * * can be safely waived and the minutes of the grand jury divulged * * *, and that the failure to do so would be an abuse of discretion and not in the furtherance of justice" (Jurisdictional Statement, p. 22).

The plaintiff then moved for reconsideration and for a ruling on plaintiff's renewed claim of privilege. The District Court, in a second opinion on July 9, 1956, again rejected the claim of privilege and adhered to the position taken in the opinion of April 17th (Jurisdictional Statement, p. 49).[4]

Proposed orders requiring plaintiff within thirty days to produce and permit the defendants to inspect and copy the transcripts of the Grand Jury testimony were submitted to the District Court at a hearing on July 23, 1956. During the hearing counsel for plaintiff said (Joint appendix, p. 13):[5]

> "Mr. McDowell: I am instructed, your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered."

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[3] *Costello* v. *United States*, 350 U. S. 359 (1956), and *United States* v. *Johnson*, 319 U. S. 503 (1943), relied on by plaintiff in its Jurisdictional Statement, are cases of this nature.

[4] Reported as *United States* v. *Procter & Gamble Company*, D. N. J., 19 F. R. D. 247 (1956).

[5] The full transcript of this hearing is set forth in the Joint appendix at pp. 11-15.

In connection with the thirty day period for production, plaintiff's counsel thereupon said (Joint appendix, p. 14):

> "* * * it makes no difference to the position of the Government. I was instructed to state that the Government will respectfully decline to produce them."

At the conclusion of the July 23rd hearing, the District Court signed the thirty day production order, which was entered shortly thereafter (Joint appendix, p. 16).[6]

On August 15, 1956, before the thirty day period for production had expired, plaintiff moved, first, to amend the production order, and second, to stay the production order. With its motion, plaintiff itself tendered a proposed amended order which provided:

> "Ordered that unless the plaintiff on or before August 24, 1956 produces * * * and permits each of the defendants or their counsel to inspect and copy * * * all or any part of the aforesaid transcripts of the testimony of witnesses who appeared before the said Grand Jury, the Court will enter an order dismissing the complaint herein."[7]

Plaintiff's motion and tendered order contained the first and only proposal, or even intimation, that dismissal should be the remedy if plaintiff failed to produce. With its motion, plaintiff filed an affidavit of the Attorney General. The affidavit, in urging entry of the proposed amended order of production or dismissal, stated (Joint appendix, p. 27):

> "* * * it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court

[6]The orders with respect to the other defendants were identical (Joint appendix, pp. 18, 20, 22).

[7]Plaintiff's motion, proposed order, affidavit of Herbert Brownell, Jr. and brief are set forth in the Joint appendix at pp. 24-31.

> order which he considers erroneous and compliance with which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

At the hearing on August 21, 1956, of plaintiff's motion for production or dismissal, plaintiff reiterated that it was seeking to change the form of the order so as to obtain appellate review therefrom without having to disobey the order, and again adverted to the "unseemly position" of disobeying a production order. (Joint appendix, pp. 34-36).[8]

In answer to plaintiff's motion for production or dismissal, Procter stated orally and in writing at the August 21st hearing:

> "* * * that the order herein dated July 23, 1956, is a proper and sufficient order at this stage of the proceedings.
>
> "However, without waiving this position Procter further states that the plaintiff's *proposed relief* of production or dismissal does not seem to be a relief which Procter could in any manner oppose" (emphasis supplied).[9]

The District Court thereupon signed plaintiff's proposed amended order, providing in substance, as we have said, that unless plaintiff produced the Grand Jury transcripts on or before August 24, 1956, "the Court will enter an order dismissing the complaint herein" (Jurisdictional Statement, p. 55).

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[8]The full transcript of this hearing is set forth in the Joint appendix at pp. 33-39.

[9]Joint appendix, p. 37; see also Procter's Answer of August 21, 1956, to Plaintiff's Motion of August 10, 1956, set forth in the Joint appendix at p. 32. The other defendants took similar positions.

Plaintiff, in accord with its prior announcements on July 23rd, did not produce the transcripts. On September 6, 1956, the court inquired of counsel for all parties "whether the plaintiff has produced as directed in the last paragraph of the amended order." Its inquiry concluded, "If the plaintiff has not produced, the court will enter an order dismissing the complaint *as provided in the amended order*" (Joint appendix, p. 41; emphasis supplied). Plaintiff replied: "*In response to your inquiry* I must respectfully state that plaintiff has not produced the grand jury transcripts for inspection by the defendants" (Joint appendix, p. 42; emphasis supplied). Each defendant replied to similar effect, and enclosed for the court's consideration suggested forms of judgments. The judgments, in substantially similar form, were filed September 13, 1956 (Jurisdictional Statement, pp. 56-9). The judgment as to Procter, for example, provided:

> "It appearing to the court that plaintiff has failed to produce, on or prior to August 24, 1956, for inspection and copying, the transcripts of the Grand Jury testimony referred to in the prior Orders of this Court,
>
> "Now, therefore, on the record in this case it is
>
> "Ordered, adjudged and decreed that, as to the defendant The Procter & Gamble Company, this action be and the same is hereby dismissed."

ARGUMENT

I.

BOTH THE "AMENDED ORDER" OF AUGUST 21, 1956 AND THE JUDGMENT OF SEPTEMBER 13, 1956 WERE CONSENTED TO BY THE PLAINTIFF.

On appeal from a judgment or decree invited by or rendered with the consent of appellant, this Court will not consider any errors waived by such invitation or consent. Either the appeal will be dismissed or the judgment will be affirmed. *The United States* v. *Evans*, 5 Cranch 280 (1809); *Evans* against *Phillips*, 4 Wheat. 73 (1819); *Pacific R. R.* v. *Ketchum*, 101 U. S. 289 (1879); *Water-Works Co.* v. *Barret*, 103 U. S. 516 (1880); *United States* v. *Babbitt*, 104 U. S. 767 (1881); *Francisco* v. *Chicago & A. R. Co.*, 8 Cir., 149 Fed. 354 (1906); *Ballot* v. *United States*, 1 Cir., 171 Fed. 404 (1909); *Rudolph* v. *Sensener*, C. A. D. C., 39 App. D. C. 385 (1912); *Marks* v. *Leo Feist, Inc.*, 2 Cir., 8 F. 2d 460 (1925); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296 (1936); *International Carrier-Call & Tel. Corp.* v. *Radio Corp.*, 2 Cir., 142 F. 2d 493 (1944); *United States* v. *All American Airways, Inc.*, 9 Cir., 180 F. 2d 592 (1950); *United States* v. *Star Const. Co.*, 10 Cir., 186 F. 2d 666 (1951); *J. A. Doggett, G. W. Allen and H. G. Allen* v. *R. L. Hunt*, 5 Cir., 199 F. 2d 152 (1952); *Stewart* v. *Lincoln-Douglas Hotel Corp.*, 7 Cir., 208 F. 2d 379 (1953); see *United States* v. *Wallace Co.*, 336 U. S. 793, 794-5, fn. 1 (1949).[10]

[10] *Vaughan* v. *City Bank & Trust Company, Natchez, Miss.*, 5 Cir., 218 F. 2d 802 (1955), *cert. den.* 350 U. S. 832 (1955), might appear to be somewhat inconsistent with the long line of authorities cited above. It appears, however, that plaintiff was not represented by counsel, and the record, though perhaps inartistic, plainly showed, according to the opinion, that the order, unlike the instant case, was "an involuntary dismissal for want of prosecution" and therefore appealable (p. 803). Cases such as *Thomsen* v. *Cayser*, 243 U. S. 66

The consent which results in dismissal of the appeal or affirmance of the judgment may be express or may be implied from a variety of circumstances. *E.g., Pacific R. R.* v. *Ketchum, supra; Water-Works Co.* v. *Barret, supra; United States* v. *Babbitt, supra; Rudolph* v. *Sensener, supra; Stewart* v. *Lincoln-Douglas Hotel Corp., supra;* see *United States* v. *Star Const. Co., supra.*

In the instant case, plaintiff itself moved for and actually tendered the order (signed by the court on August 21st), which provided that the court would dismiss the complaint unless plaintiff produced the Grand Jury transcripts by August 24th. It was this motion which originated and was the sole cause of the dismissal of this action. Neither Procter nor any other defendant sought, suggested or intimated a dismissal or did anything to contribute thereto. Nor did the court do so.

Plaintiff, in its Jurisdictional Statement (p. 5, fn. 3), contends that defendants consented to the August 21st order. It would be immaterial if this were true, as the consent of a defendant to the dismissal of the litigation would not justify an appeal by the plaintiff, which had also consented. *Pacific R. R.* v. *Ketchum,* 101 U. S. 289 (1879); *Stewart* v. *Lincoln-Douglas Hotel Corp.,* 7 Cir., 208 F. 2d 379 (1953). However, the defendants did not in fact consent to the August 21st order. Procter's only statement in connection therewith was that the July 23rd order was sufficient but that Procter, as a defendant in the action, did not believe that it could oppose plaintiff's proposed *relief*, which provided for dismissal of the complaint if the Grand Jury transcripts were not produced (Joint appendix, pp. 32, 36-37).

(1917), are merely instances where a plaintiff, after judgment in his favor is reversed by a federal Court of Appeals, waives his right to a new trial so that an immediate writ of error to the Supreme Court might be taken. They are not regarded as appeals from consent judgments.

It is perhaps supererogation to point out that the August 21st order tendered by plaintiff was intended to result in the dismissal of the action and nothing else. For, before plaintiff tendered that order, it had formally announced in court on direct instructions from the Attorney General that plaintiff would not at any time produce the Grand Jury transcripts which the court had, on July 23rd, ordered to be produced (Joint appendix, pp. 13-14).

The September 13th judgment of dismissal was merely the implementation of the order of August 21st. The judgment stemmed directly from the express and mandatory provision of that order that "the Court *will* enter an order dismissing the complaint" on plaintiff's failure to produce the transcripts (emphasis supplied). The matter of production was solely plaintiff's decision—which it had already announced. So when plaintiff failed to produce, the September 13th judgment followed as a matter of course from the August 21st order. It did not require the court to make any further decision or to exercise any discretion.

For all these reasons, plaintiff's consent to the September 13th judgment is entirely clear. In fact, the District Court in its September 6th letter, which was acknowledged by plaintiff, expressly stated that the dismissal would be "as provided in the amended order" of August 21st (Joint appendix, p. 41). The September 13th judgment, therefore, like the August 21st order, is not appealable.

II.

THE PLAINTIFF WAS NOT FORCED OR REQUIRED TO MOVE FOR AND TENDER THE ORDER OF AUGUST 21, 1956, WHICH LED TO THE JUDGMENT OF SEPTEMBER 13, 1956.

Despite the ambiguous and misleading assertion on page 3 of plaintiff's Jurisdictional Statement, the record shows without any ambiguity that at no time prior to entry

of plaintiff's proposed and tendered order of August 21st had the production of the transcripts been ordered "on pain of dismissal of the suit". The July 23rd order merely required production of the transcripts, and nothing more. There had not been a single intimation as to the nature of the remedy to be adopted in case plaintiff did not produce—nothing to indicate that dismissal would have been requested by the defendants or ordered by the court.

The Federal Rules of Civil Procedure provide for various other remedies in the event of failure to comply with a discovery order (Rule 37[b]). For example, further proceedings may be stayed until the order is obeyed, or there may be a citation for contempt, or the court may "make such orders in regard to the refusal as are just," that is, such other and different remedies as may be appropriate under the circumstances. Indeed, there is no requirement that any particular remedy be sought or ordered.

Obviously, therefore, dismissal need not follow failure to produce, and plaintiff was not consenting to the inevitable when it moved for and tendered the order of August 21, 1956. To the contrary, plaintiff by its own conduct made inevitable a dismissal which might otherwise never have occurred, and which in similar situations has not occurred, even where there is no production.

III.

EVEN IF DISMISSAL HAD BEEN INEVITABLE, PLAINTIFF'S CONSENT THERETO DESTROYS THE RIGHT TO REVIEW.

Even if we could assume, quite contrary to the fact, that dismissal of the action was an inevitable consequence of plaintiff's failure to produce the transcripts, plaintiff's consent to dismissal has nevertheless destroyed its right to appeal and has foreclosed it from challenging error in the dismissal.

Indeed, even in those instances where a prior adverse ruling is fatal to a plaintiff's case—which, of course, is not true of the July 23rd discovery ruling—plaintiff's consent to dismissal destroys his right to a review in the federal courts. *Francisco* v. *Chicago & A. R. Co.*, 8 Cir., 149 Fed. 354 (1906); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 295 (1936); see *The United States* v. *Evans*, 5 Cranch 280 (1809); *Marks* v. *Leo Feist, Inc.*, 2 Cir., 8 F. 2d 460 (1925); *Rudolph* v. *Sensener*, C. A. D. C., 39 App. D. C. 385 (1912); cf. *United States* v. *Wallace Co.*, 336 U. S. 793, 794-5, fn. 1 (1949). In the words of *Rudolph* v. *Sensener*, *supra*, "The situation is of their [plaintiffs'] own creation, no matter what was the inducement thereto, and there is nothing from which they can appeal" (p. 388). The point is made clear in *Kelly* v. *Great Atlantic & Pacific Tea Co.*, *supra*, where Judge Parker states (p. 297):

> "* * * we now definitely hold that whether or not an appeal lies from a voluntary nonsuit is a matter of appellate practice, as to which the Conformity Act (28 U. S. C. A. § 724) does not govern, and that in the federal courts no appeal lies from such voluntary order, whether taken upon a ruling determinative of the rights of the parties or not."[11]

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[11]Some state courts apparently consider a voluntary dismissal resulting from a prior adverse ruling appealable, on the questionable theory that plaintiff's consent was coerced. See, *e.g.*, *Mobley* v. *Watts*, 98 N. C. 284, 3 S. E. 677 (1887); *Marlboro Cotton Mills* v. *O'Neal*, 114 S. C. 459, 103 S. E. 781 (1920); *Ford* v. *Houston & T. C. R. Co.*, 58 Tex. Civ. App. 556, 124 S. W. 715 (1910). Even in the state courts, however, the prior adverse ruling must have been one which was fatal to plaintiff's recovery—which was not so in the instant case. See, *e.g.*, *Bailey* v. *Barnes*, 188 N. C. 378, 124 S. E. 742 (1924); *Hill* v. *Clark*, 209 N. C. 358, 183 S. E. 367 (1936); *Allen* v. *A. & C. Air Line R. Co. et al.*, 216 S. C. 188, 57 S. E. 2d 249 (1950); *Ford* v. *Houston & T. C. R. Co.*, 58 Tex. Civ. App. 556, 124 S. W. 715 (1910). Decisions in the state courts are in nowise controlling or even applicable. Moreover, so far as we know, no jurisdictions permit appeals through voluntary nonsuits from

United States v. *Wallace Co.*, 336 U. S. 793, 794-5, fn. 1 (1949), is not to the contrary. There, plaintiff was denied the use of documents essential to its case. An appeal from the resulting dismissal of the case was entertained by the Supreme Court, but only because plaintiff did *not* invite the dismissal, as distinguished from the instant case where plaintiff *did* invite it.

IV.

THE CONSEQUENCES OF CONSENT TO DISMISSAL ARE NOT AFFECTED BY MOTIVE OR PURPOSE.

As previously stated plaintiff sought to justify the "amended order" of production or dismissal, because "* * * it would be unseemly * * * to be placed in the dilemma either of having to comply * * * or * * * to disobey * * * without * * * an opportunity for effective appellate review" (Joint appendix, p. 27).

Plaintiff's motives in consenting to a judgment of dismissal have, so far as we know, never been held to be material. Certainly the opinion of a litigant, be it the Government or an individual, as to whether a court order or disobedience thereof is "seemly" could not change established rules of procedure—could not in this case give a right of appeal to one who has consented to a judgment.

The principle is particularly sound in the situation presented here. For a normal and frequently used method for an individual or for the Government to preserve its right of appeal from a production order is by disobeying the order of production, being held in contempt and then appealing. See *Hickman* v. *Taylor*, 329 U. S. 495 (1947);

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rulings not dispositive of the issues on the merits. See Annotation, *Appellate Review At Instance of Plaintiff Who Has Requested, Induced or Consented To Dismissal or Nonsuit*, 23 A. L. R. 2d 664 (1952).

Bowman Dairy Co. v. *United States*, 341 U. S. 214 (1951). Under this procedure, it is common practice for the trial court to impose a nominal penalty or perhaps to suspend the penalty pending a proper appeal from the court's action. *Appeal of United States Securities & Exchange Com'n*, 6 Cir., 226 F. 2d 501, 520 (1955); *United States* v. *Costello*, S. D. N. Y., 16 F. R. D. 428 (1954), *aff'd* 2 Cir., 222 F. 2d 656 (1955), *cert. den.* 350 U. S. 847 (1955). Thus, there is no basis here for any charges of "unseemly" conduct or of any real embarrassment.

Furthermore, in the instant case, plaintiff's excuse for seeking the consent judgment that it would be "unseemly" to disobey a court order has, on the face of the record, no substance or justification. As we have seen, on July 23rd —weeks before the plaintiff's motion for an "amended order"—plaintiff had solemnly and formally stated that it would not at any time produce the transcripts ordered produced by the court, and this anticipatory, unequivocal and defiant refusal was on express instructions from the Attorney General.

How can plaintiff seriously urge at a later date that it is "unseemly" to be faced with a disobedience it has already announced weeks before? And how could such a contention serve to abrogate the established principles of appellate law and procedure, and to give the plaintiff a right to appeal from an order or judgment which plaintiff originated and to which it consented.

As a matter of fact, plaintiff's contention based on "unseemly" disobedience calls attention to another reason why plaintiff is morally and legally foreclosed from appealing. The August 21st order sought and consented to by plaintiff in order to avoid "unseemly" disobedience did in fact result in extricating plaintiff from the dilemma of producing or disobeying the court's order. It actually gave plaintiff in the District Court the benefit which it sought,

and also saved plaintiff from the possibility of a contempt citation below.

The Government, as well as a private individual, has no right to ask and receive benefits under a court order and then seek to repudiate its legal effect. In this case the plaintiff, having sought and obtained benefits from the consent order must be held to its other consequences, including specifically the loss of any right of appeal.

V.

PLAINTIFF'S CONSENT TO A DISMISSAL, THOUGH GIVEN FOR THE PURPOSE OF APPEAL, DOES NOT RENDER THE DISMISSAL APPEALABLE.

Plaintiff may also advance the "circular" contention that, since its consent to the dismissal was in order to appeal, the consent was nugatory, and that since the consent was nugatory the appeal was proper. The authorities do not support such a position. *United States* v. *Babbitt*, 104 U. S. 767 (1881); *Ballot* v. *United States*, 1 Cir., 171 Fed. 404 (1909); *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296 (1936).

The rule of these cases applies to the Government as well as to individuals. The point was disposed of in *United States* v. *Babbitt*, 104 U. S. 767 (1881), where Chief Justice Waite said (p. 768):

> "The question presented to the court below on the trial of this case was, whether in the computation of longevity pay for an officer of the army of the United States, under the provision of sect. 7 of the act of June 18, 1878, c. 263 (20 Stat. 145), his period of service as a cadet at West Point was to be taken into account. The court decided it was not, and an elaborate opinion to that effect was filed; but the record shows that, after the decision

> was announced, a *pro forma* judgment was rendered, with the consent of the Attorney-General, in favor of the claimant. This is stated in the judgment to have been done because the case was one of a class, and the claimant, if judgment should be given against him, could not appeal. In *Pacific Railroad* v. *Ketchum* (101 U. S. 289), we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion, this case comes within that rule. The consent to the judgment below was in law a waiver of the error now complained of. For this reason the judgment below must be affirmed; * * *."

In other words, the effect of consent dismissals is not altered by the fact that plaintiff sought a dismissal for the purpose of appealing. If anything, this acknowledged purpose emphasizes the fact that the dismissal was intentional. It also shows a deliberate attempt to evade the established rules of procedure—an attempt which should be condemned rather than condoned.

VI.

SPECIFICALLY, A VOLUNTARY DISMISSAL BECAUSE OF AN ADVERSE DISCOVERY RULING IS NOT REVIEWABLE.

Innumerable discovery rulings or evidence rulings occur daily in the federal courts. Such rulings, including specifically orders for the production of documents, have been held interlocutory and not appealable. *Alexander* v. *United States*, 201 U. S. 117 (1906); *Apex Hosiery Co.* v. *Leader*, 3 Cir., 102 F. 2d 702 (1939). Litigants have consistently been denied the right to obtain a review of such procedural points by devising, initiating or consenting to the conver-

sion of interlocutory—and unappealable—rulings into judgments of dismissal.

Thus, in *The United States* v. *Evans*, 5 Cranch 280 (1809); the United States, which after rejection of certain of its testimony became nonsuit, was not permitted to raise the question on appeal. In *International Carrier-Call & Tel. Corp.* v. *Radio Corp.*, 2 Cir., 142 F. 2d 493, 494 (1944), Judge Swan said of a plaintiff who took a dismissal when his motion to defer evidence on his second count was denied, "Having consented to a final dismissal of the unfair competition count, it is utterly fatuous to suppose that this part of the judgment can be reversed on appeal."

Similarly, in *Marks* v. *Leo Feist, Inc.*, 2 Cir., 8 F. 2d 460 (1925), the court indicated that an appeal was not sustainable where the record showed that plaintiff requested dismissal after denial of his application for a commission to take testimony in Germany. See also *Rudolph* v. *Senseney*, C. A. D. C., 39 App. D. C. 385 (1912), and *Halpern* v. *Gunn*, Mun. App. D. C., 57 A. 2d 741 (1948).

This is the universal rule. It is not affected by the correctness or incorrectness of previous rulings, or by the fact that the Government is plaintiff, or by the possibility that public policy is involved, or by whether the case is "important" or "substantial" (see Jurisdictional Statement, pp. 6-10). If, indeed, the matter of "importance" were involved, the most important and substantial question now before the Court is the one we now present, that is, whether a dismissal of an action can be appealed by a plaintiff which invited and consented to it. This is a question which vitally affects the entire administration of federal appellate law.

VII.

THE RULES FORBIDDING APPEALS FROM INTERLOCUTORY ORDERS WOULD BE ABROGATED IF AN APPEAL COULD BE TAKEN FROM A CONSENT DISMISSAL.

If "sleight of hand" experiments, such as have been adopted by plaintiff in this case, could justify an appeal or review of a dismissal on consent, then similar methods could be applied to justify an appeal by any plaintiff, Government or individual, from any or all discovery rulings and from many, if not all, other interlocutory decisions. See *Francisco* v. *Chicago & A. R. Co.*, 8 Cir., 149 Fed. 354, 359 (1906).

The Government, of course, is not to be granted rights of review unavailable to the individual citizen. As Judge Augustus N. Hand said in *Bank Line* v. *United States*, 2 Cir., 163 F. 2d 133, 138 (1947):

> "It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. * * * The existence of governmental privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual, without recourse to prerogative writs where such writs would not be available to the ordinary citizen."

Thus, if a right of review is here sustained, the doors of the appellate courts will be thrown open to all litigants desiring to obtain review of interlocutory orders by "tongue in cheek" consent to dismissals.

To permit review under such circumstances would delegate to plaintiffs in general a large measure of control over the appellate practice of the federal courts, would nullify

the salutary principle forbidding piecemeal appeals and would throw on the appellate courts a heavy burden not contemplated by the appeal statutes. Precedent and logic forbid such evasion of the rules of appellate practice by permitting appeals from interlocutory decisions under the guise of appeals from judgments of dismissal proposed or consented to by plaintiffs. As the court said in the comparable case of *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 4 Cir., 86 F. 2d 296, 297 (1936):

> "The crux of the matter is that an order refusing to remand is not a final or appealable order, and plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing."

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Dated: January 2, 1957.

Respectfully submitted,

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